Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1978.

No. 78-208

SITKIN SMELTING & REFINING CO., INC.,
MONONGAHELA IRON & METAL CO., INC.,
Petitioners,

v.

FMC CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Petitioners, Sitkin Smelting & Refining Co., Inc. and Monongahela Iron & Metal Co., Inc. (hereinafter "Sitkin" and "Monongahela"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on April 13, 1978.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Third Circuit and the dissenting opinion are officially reported as *Sitkin Smelting & Refining Co. v. FMC Corp.*, 575 F. 2d 440 (3d Cir. 1978), and are set forth in Appendix A to this Petition.

The opinion of the United States District Court for the Eastern District of Pennsylvania is not officially reported. It is set forth in Appendix B to this Petition.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on April 13, 1978. A timely petition for rehearing *in banc* was denied on May 11, 1978, and this Petition is filed within 90 days of that date.

The Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether section one of the Sherman Act is violated when a buyer and seller conspire to have seller solicit bids from 50 of buyer's competitors in order to award the contract to buyer at the price quoted by the highest and best bidder.

2. Whether an appellate court may set aside a jury's answer to a special interrogatory regarding the intent of contracting parties by characterizing as "neutral" evidence which the district court found to be "more than sufficient[ly] credible" and by weighing against it other evidence which the appellate court deems to be "of more importance."

STATUTES INVOLVED.

United States Code, Title 15:

§ 1. Trusts, etc., in restraint of trade illegal.

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . . .

STATEMENT OF THE CASE.

As a result of hurricane damage to its 30 acre rayon manufacturing plant, FMC Corporation (hereinafter "FMC") decided to dispose of the plant and its contents. Because the plant contained vast quantities of machinery and equipment, FMC solicited the bid of Sitkin, a scrap metal dealer. Sitkin demurred because FMC in the past had always given its scrap business to his local competitor, Krentzman, and Sitkin did not want to be "used" to set a price for his competitor. FMC assured Sitkin that if he bid, it would not disclose the bid to any other bidder or use it to negotiate higher bids, and it would accept the highest and best bid if any were accepted. As a result of those assurances, admitted by FMC, plaintiffs bid.

Plaintiffs' bid was higher by several hundred thousand dollars than that of Krentzman, the only other bidder. Neither bid was accepted, however, because FMC donated the real estate to the local community and solicited a second round of bidding, this time for the machinery and equipment alone.

FMC then conspired with Krentzman to award Krentzman the contract at the price that would be bid by the highest and best bidder. It invited 50 scrap dealers from throughout the country to visit and inspect the plant as a condition of their submitting bids. Twelve dealers, including plaintiffs and Krentzman, came, evaluated the metals and bid. Once again, as they had done in connection with the first round of bids, plaintiffs devoted hundreds of hours to the process of evaluating the metals. Once again, plaintiffs' bid was highest and best. Effectuating the conspiracy, FMC then revealed it to Krentzman, took a rebid from him, and awarded him the contract.

Sitkin invoked the jurisdiction of the federal district court under 28 U. S. C. §§ 1331, 1337, and 15 U. S. C. § 15

on its claim against FMC for violation of the Sherman Act, and under 28 U. S. C. § 1332 on its claim for breach of contract.

The jury found all the essential facts by answering special interrogatories.[1] It found that the contractual assurances FMC made to Sitkin were intended to endure through the second round of bidding. It found that FMC breached those assurances and that it unlawfully conspired with Krentzman to exclude all other bidders from the contract and award it to Krentzman at a price set by the highest and best of all the bids.

The District Court found that the jury's factual findings were supported by "more than sufficient credible evidence." It affirmed the contract award, but set aside the antitrust award because, though FMC's conduct was "reprehensible", "deceitful" and "fraudulent", in its view the conspiracy did not constitute a violation of the Sherman Act.

The Court of Appeals conceded that the case involved a reprehensible conspiracy, entered into in advance of the bidding, to manipulate the bids of businessmen in order to award a contract to a co-conspirator at a price bid by others. But the Court, Judge Gibbons dissenting, held that there had not been sufficient judicial experience to classify such practices as *per se* violations, and affirmed the District Court.

The Court of Appeals, Judge Gibbons dissenting, also set aside the contract verdict, holding the evidence insufficient to support the jury's finding that the contract was intended to endure through the second round of bidding.

1. The jury's answers to the special interrogatories are set forth in Appendix C hereto.

REASONS FOR GRANTING THE WRIT.

The majority's decision conflicts in principle with this Court's decision in *National Society of Professional Engineers v. United States,* 98 S. Ct. 1355 (1978), decided less than two weeks after the instant decision, and with this Court's decision in *Addyston Pipe and Steel Co. v. United States,* 175 U. S. 211 (1899), decided 79 years ago. The question presented is of great importance because it involves a common practice which corrodes the competitive system and for which there is no real remedy apart from the anti-trust laws.

Every judge in this case—the trial judge (A28-30), as well as the majority (A10) and dissenting (A21-23) judges on the Court of Appeals—conceded that there was ample evidence of a conspiracy. That conspiracy was to induce scrap dealers throughout the country to appraise and bid on the metals in FMC's plant, by fraudulently advising them that they were engaged in legitimate competitive bidding, so that the contract could be let to FMC's favored scrap metal dealer at a price set by the highest and best bid. Although the entire purpose and the whole effect of such a conspiracy is anticompetitive, and no redeeming element has ever been suggested for it, the majority concluded that there has not been sufficient judicial experience with such practices to classify them as *per se* violations.

I. The Third Circuit's Decision on the Antitrust Issue Conflicts in Principle With National Society of Professional Engineers v. United States.

In *National Society of Professional Engineers v. United States, supra,* Justice Stevens, for the Court, concluded that while the anti-trust laws do not *require* competitive bidding, a ban on competitive bidding is illegal on

its face. It is "not price fixing as such", but "no elaborate industry analysis is required to demonstrate the anti-competitive character of such an agreement" for any agreement which "interferes with the setting of price by free market forces is illegal on its face." 98 S. Ct. at 1365. For the same reasons, a conspiracy to conduct spurious competitive bidding is facially illegal.

A. The Conspiracy Is Illegal on Its Face Because of Its Anticompetitive Character.

Free market forces are more effectively destroyed by spurious competitive bidding than by a ban. A ban is open and above board. All interested parties know that other means must be employed to compete, and they may be expected to use them. But where, as here, businessmen are deceived into believing that they are competing for a contract being let on a one-bid auction,[2] they are induced to submit their best price, they are lulled into sitting back and waiting for the results, and they are totally precluded from using any competitive means whatever to gain access to the market for the contract.

It is argued that while free market forces were used deceitfully here, they did in fact achieve their principle and beneficent purpose of setting the price. But that is not so. If honest competitive bidding had occurred, either the price or the identity of the buyer, or both, would have been different. Either Krentzman would have bid higher

2. The invitation to bid stated, "No revision of bids will be accepted after the bid has been submitted; your best bid must be submitted first." (671a)

(Page numbers followed by a small letter "a" refer to the pages of the two volume Appendix to the Briefs which was filed in the Third Circuit. A copy of the Appendix has been transmitted to the Court pursuant to Supreme Court Rule 21.

Page numbers preceded by the capital letter "A" refer to the pages within the appendices to this Petition.)

in the first place [3] and been awarded the contract at a different price, or plaintiffs would have been awarded the contract.

Even if there had been no competitive bidding—that is, if FMC had exercised its lawful right to deal with Krentzman alone—the price would likely have been very different, and in the end some other buyer may very well have prevailed. What Krentzman might have paid in such a one-on-one negotiation, knowing that there were many other interested buyers FMC could turn to, will never be known. For the conspiracy not only rendered the competitive bidding a sham; it also destroyed the *potential* competition of other buyers "in the wings" which necessarily affects negotiations even between a single buyer and a single seller. *United States v. Penn-Olin Chemical Co.*, 378 U. S. 158, 174 (1964). Here there was no such potential competition, for from the very beginning all potential competitors had been fraudulently induced to reveal their prices—the principal means by which businessmen compete.

The price which free market forces would have produced cannot be determined here because from the moment the conspiracy began those forces did not function. Competition was not at work at any time. Instead, thousands of hours of work by a dozen businessmen were diverted from normal productive business channels to serve the anticompetitive purposes of the conspirators. *Cf. Northern Pacific Ry. Co. v. United States*, 355 U. S. 1, 4 (1958).

The factual distinction between *National Society* and the instant case is that the agreement in *National Society* was an agreement among potential competitors, whereas

3. Instead, knowing that he would be allowed to see and match the highest bid, his first bid was intended merely to be "in the ball park." (393a)

here the conspiracy was between a seller, FMC, and one of many potential buyers. Yet there is no difference in principle because competition is destroyed as much in the one case as in the other. If the *bidders* had conspired to let Krentzman be the high bidder, FMC would have been the victim—the case would have presented the classic *per se* violation, on all fours with *Addyston Pipe and Steel Co. v. United States, supra.* Here, by falsely inducing the bidders to submit their best bids and to compete no further, pursuant to a vertical conspiracy to let Krentzman steal the best bid, the legitimate bidders became the victims. The identity of the victim is immaterial, however, where both practices completely thwart competitive forces and result in the allocation of a job to a different contractor and at a different price than would have prevailed in a free market.

Spurious competitive bidding, even more than a ban on competitive bidding, is definitionally anticompetitive. The majority's conclusion that before its anticompetitive character is established, more judicial experience is required (A13) with what they conceded was a reprehensible conspiracy to manipulate bids (A16), simply defies explanation.

B. The Conspiracy Is Illegal on Its Face Because of the Absence of Any Lawful Purpose.

Where an agreement restrains trade but also has some other purpose, a rule of reason inquiry focusing on the challenged restraint's impact on competition may be required. *National Society of Professional Engineers v. United States,* 98 S. Ct. at 1364-1365. But where there is no purpose even suggested other than the anticompetitive purpose which appears on the face of the conspiracy, then the law has been violated and the inquiry is ended. Judge

(later Chief Justice) Taft made this point in his famous Court of Appeals decision in the *Addyston* case, *United States v. Addyston Pipe and Steel Co.,* 85 F. 271 (6th Cir. 1898), when he said:

> "In such a case [where there is nothing to justify or excuse the restraint] there is no measure of what is necessary to the protection of either party, except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose, to subserve which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition, which it has always been the policy of the common law to foster." 85 F. at 283.

Judge Taft sharply criticized those courts which

> "have set sail on a sea of doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not." *Id.* at 238-284.

It was on this basis that Judge Gibbons dissented in the instant case, calling his difference with the majority "fundamental," as indeed it was. In the first place, no "judicial experience" is needed to assess the effect of corrupt bidding practices. In the second place, where no lawful purpose for the conspiracy is even suggested, an inquiry into "how much restraint of competition is in the public interest, and how much is not," *Addyston,* 85 F. at 284, is simply an impermissible judicial inquiry.

II. The Antitrust Question Presented Is of Great Importance.

The question of the facial illegality of a conspiracy to fraudulently extract from businessmen their best price is of great importance not only because such a conspiracy eats at the heart of competition, but also because only the antitrust laws can put a stop to such practices. Under normal contract and tort principles, the contract letting party and his favored bidder participating in such a scheme cannot be denied the profits of their conspiracy. Absent special assurances of a type that Sitkin received here, the highest and best bidder has no contractual right to recover at all, because a bid submitted in response to a bid solicitation does not create a contract. *Fenstermacher v. Philadelphia National Bank*, 493 F. 2d 333, 342 (3d Cir. 1974); *Premier Electric Construction Co. v. Miller-Davis Co.*, 422 F. 2d 1132, 1135 (7th Cir. 1970); 1 Corbin, Contracts § 24 (1950). In a tort action for fraud and deceit, a duped bidder's damages are limited to his out-of-pocket costs in preparing a bid. *Kaufman v. Mellon National Bank & Trust Co.*, 366 F. 2d 326, 331 (3d Cir. 1966). Thus absent an antitrust remedy, there simply is no real deterrent to engaging in such fraudulent bidding practices.

We urge this Court to grant certiorari, and to hold that the Sherman Act outlaws a conspiracy to issue a spurious invitation to bid in order to set the price between the conspirators.

III. The Third Circuit's Decision on the Contract Claim Is in Direct Conflict With Decisions of This Court and the Circuit Courts Regarding the Appropriate Standards of Appellate Review.

It is not disputed that where no duration is specified in a contract, the intention of the contracting parties as to duration must be determined by the jury from the surrounding circumstances and by the application of a reasonable construction to the agreement as a whole. *Thomas v. Thomas Flexible Coupling Co.*, 353 Pa. 591, 46 A. 2d 212, 215 (1946).

The majority below reversed the jury's express finding that the contract between Sitkin and FMC endured through the second round of bidding. (Interrogatory 2, A36). Eight items of evidence—which the trial judge found to be "more than sufficient[ly] credible" (A27)—were regarded as "neutral" or "argumentative" by the majority, which weighed other facts against them and found those other facts to be "of more importance" (A8). This it simply may not do. *Lavender v. Kurn*, 327 U. S. 645 (1946). We urge this court to grant certiorari in order to restate the appropriate standards of appellate review.[4]

The evidence of the parties' intention as to duration is set out in very summary form at pages 6-10 of petitioners' Petition for Rehearing and Suggestion of Appropriateness of Rehearing In Banc which has been filed with the Court pursuant to Supreme Court Rule 21. The majority did not dispute that evidence. It simply dismissed it as "neutral" and "argumentative," singularly and in the aggregate, and weighed it against other evidence which it regarded as more persuasive. Almost all of the evidence came from the cross-examination of one or another of the three-man FMC team responsible for the disposal of the facility. The jury had a full opportunity to observe all three as they were subjected to the truth-finding processes which are at the heart of our system of jurisprudence, and drew the all but inevitable inference that the assurances were intended to endure throughout the bidding process.

4. Chief Judge Seitz, who wrote the Court's opinion, pursued the same impermissible process of weighing conflicting evidence in *Venzie Corp. v. United States Mineral Products Co.*, 521 F. 2d 1309 (3d Cir. 1975).

The record firmly supports the conclusion of dissenting Judge Gibbons that the majority "substituted its own evaluation of the evidence for that of the jury." (A21) By doing so, the majority acted in direct conflict with the principles announced by this Court in *Lavender v. Kurn*, 327 U. S. 645, 653 (1946):

> "Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

The Court also departed from the principle widely followed in other circuit courts that evaluating the "credibility of the evidence and the weight of it" is beyond the perimeters of appellate review. *Melia v. Ford Motor Co.*, 534 F. 2d 795, 799 (8th Cir. 1976); *U. S. Philips Corp. v. Ferro Corp.*, 522 F. 2d 1100, 1101 (6th Cir. 1975); *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F. 2d 934 (5th Cir. 1975); *American Hot Rod Ass'n., Inc. v. Carrier*, 500 F. 2d 1269, 1276 (4th Cir. 1974). Cf. *Venzie Corp. v. United States Mineral Products Co., supra.*

CONCLUSION.

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1003/4

SITKIN SMELTING & REFINING CO., INC. AND MONONGAHELA IRON & METAL CO., INC.,
Appellants in No. 77-1003

v.

FMC CORPORATION

SITKIN SMELTING & REFINING CO., INC. AND MONONGAHELA IRON & METAL CO., INC.,

v.

FMC CORPORATION,
Appellant in No. 77-1004

(D. C. Civil No. 74-798)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued September 8, 1977

Before SEITZ, *Chief Judge*, and GIBBONS and WEIS, *Circuit Judges*.

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Opinion of the Court

(Filed April 13, 1978)

SEITZ, *Chief Judge.*

Plaintiffs Sitkin Smelting & Refining Co., Inc. and Monongahela Iron & Metal Co., Inc. ("plaintiffs"), sued FMC Corporation ("defendant") in the district court. In Count 1, plaintiffs' diversity claim alleged that by awarding to Joseph Krentzman and Sons ("Krentzman") a contract

to dismantle defendant's Lewistown rayon facility after allowing Krentzman to see planitiffs' bid, FMC breached contractual obligations it owed plaintiffs. In Count 2, plaintiffs alleged a violation of Section 1 of the Sherman Act in that defendant conspired with Krentzman, who was not named as a defendant, to commit two per se violations of the antitrust laws: an illegal boycott and price fixing.

The court submitted Counts 1 and 2 to the jury on special interrogatories. The jury's answers favored plaintiffs. The court then entered judgment against defendant on both counts. Defendant filed motions for judgment notwithstanding the verdict with respect to both the contract and antitrust claims and also filed a motion for a new trial. The district court denied the motion for judgment n.o.v. and denied the motion for a new trial on Count 1, the contract claim. It granted defendant's motion for judgment n.o.v. and entered judgment in its favor on Count 2, the Sherman Act claim.

Defendant appealed from the judgment of $700,000 entered for plaintiffs on the contract claim and from the denial of the motion for a new trial. Plaintiffs appealed from the entry of judgment in favor of defendant on the antitrust claim.

We turn to the factual setting out of which the dispute arose. In view of the jury's answer to the interrogatories, we set forth the facts in a light most favorable to plaintiffs.

Defendant owned a manufacturing facility in Lewistown, Pennsylvania. In the summer of 1972, the facility was damaged extensively by a hurricane. Thereafter, defendant decided to close the plant and to sell or otherwise dispose of it. In addition to the land and the buildings, the assets included salvageable scrap metal, machinery, equipment, and inventory. Defendant's agent solicited Sitkin to submit a bid for the plant and its contents. Plaintiffs submitted such a bid which, by its terms

was to expire October 20, 1972. Krentzman was the only other bidder.

After the two bids were received, defendant altered its plans and did not accept either bid. It decided to donate the land and buildings at the plant site to a public authority. In the words of plaintiffs' counsel, defendant then "started all over again." Thus, in July, 1973, defendant prepared elaborate bidding documents with respect to the sale of the scrap. Those documents contained various options including possible participation by defendant in the proceeds of the sale of the property. Invitations to bid were sent to approximately 50 prospective bidders throughout the United States. The invitations explicitly reserved the right to reject any and all bids. They also stated: "No revision of bids will be accepted after the bid has been submitted; your best bid must be submitted first." Bids were to be submitted by October 22, 1973.

Sitkin submitted a bid jointly with its co-plaintiff. Krentzman also submitted a bid, as did many other invitees.

After the October 22 deadline, individual clarification meetings were held with certain of the bidders, including plaintiffs and Krentzman. Subsequent to one of these clarification meetings between defendant's agents and Krentzman, Krentzman submitted a bid higher than plaintiffs, and Krentzman's bid was eventually accepted. This lawsuit followed.

I. The Contract Claim

Plaintiffs contend that among the original bids submitted in 1973, theirs was the highest. They argue that in awarding the scrap contract to Krentzman after Krentzman had seen plaintiffs' bid and then revised its own, the defendant breached its commitment made in 1972 to plaintiffs and carried forward to 1973, that if plaintiffs bid, defendant would not disclose their bid or use it to negotiate a higher bid, and would award the bid to plaintiffs if plaintiffs were the high bidder. We turn to the details of the evidence.

In 1972, prior to the submission of plaintiffs' first bid, Charles Kline, an employee of defendant, held a conversation with Lewis Sitkin, president of one of the plaintiffs, Sitkin, concerning a possible bid by Sitkin to purchase the Lewistown assets. Because Sitkin had not succeeded in doing business with defendant in the past, it sought assurances of good faith treatment by defendant should it bid for such assets. Sitkin was assured that if it submitted a bid to purchase defendant's Lewistown facility, defendant would not disclose that bid to any other bidder, would not use the bid to negotiate higher bids from other bidders, and would, if it accepted a bid, accept the "high" bid.

Plaintiffs do not contend that there was any breach of these assurances insofar as the 1972 bidding was concerned. What they do contend is that the 1972 assurances carried over to the 1973 bidding, and that those assurances were violated when defendants disclosed plaintiffs' bid to Krentzman, thereafter permitted Krentzman to submit a higher bid, and then accepted Krentzman's altered bid. Accordingly, at the trial below plaintiffs sought damages for breach of contract arising from the defendant's failure to award the contract to them on the theory that, since the 1972 high bid assurance carried over to 1973, and since plaintiffs submitted the original high bid in 1973, defendant was contractually obligated to accept it.[1]

1. Plaintiffs do not seek recovery for the costs of preparing the bids. Indeed, plaintiffs' counsel conceded at the close of the evidence that they had not introduced any evidence of any damages based solely on the possible breach of the 1972 assurances other than the 1972 high bid assurance.

The defendant contends, inter alia, that there was insufficient evidence as a matter of law to submit to the jury the issue as to whether the 1972 high bid assurance carried over to 1973.

We think the evidence warranted the jury in finding that the assurances alleged by plaintiffs were given in connection with the 1972 solicitation of bids. It is important to analyze the legal consequences of the high bid assurance, however, because it is basic to plaintiffs' breach of contract claim arising out of defendant's failure to award the contract to plaintiffs in 1973.

In plaintiffs' view the 1972 agreement to award the contract to only the high bidder endured as long as the parties intended it to endure. Plaintiffs argue that was until a contract for the disposal of the machinery and equipment was awarded in a bidding procedure. They say that there was sufficient evidence to require the submission of that issue to the jury.

It is not clear to us whether plaintiffs characterize the 1972 high bid agreement as a bilateral contract or a unilateral contract, or whether they rely on an estoppel theory of induced reliance. But no matter how classified, the same issue is presented as to whether the 1972 agreement embraced the 1973 bidding, at least as to the high bid assurance. We proceed to consider seriatim the evidence which plaintiffs contend created a jury issue as to the 1973 bidding.

The plaintiffs emphasize that the only two bidders in 1972 were metal dealers, not real estate brokers. They say this shows that defendant knew that the real value of the assets was in the metals which alone were the subject of the 1973 bidding. This appears to be the only 1972 evidence offered by plaintiffs in support of their contention that the parties intended this high bid agreement to be

effective until the metal was sold. Such evidence is neutral at best as to the parties' intent with respect to the duration of the oral assurance to award the contract to the original high bidder.

Plaintiffs next point to several pieces of evidence consisting of events occurring in 1973 which, they contend, justified the submission of the intention issue to the jury:

1. In 1973, after defendant had decided to donate the real estate to the community, Kline informed another employee of defendant, one Bisio, of the high bid assurance Kline had given Sitkin in 1972.

2. When Kline met with Sitkin numerous times in 1973 concerning the sale of the scrap, Kline never informed Sitkin that the 1972 high bid assurance was inoperative.

3. Communications to Sitkin concerning bidding in 1973 came from Kline or through his direction.

4. Both the July, 1973, communication and the September, 1973, invitation to bid confirmed the 1972 high bid assurance. Plaintiffs so conclude because the communication stated "not subject to escalation," and because the invitation stated that "no revision of bids will be accepted . . . ; your best price must be submitted first."

5. The secretiveness of defendant in its dealings with Krentzman in 1973 exhibited an awareness of a mutual intent in 1972 that the 1972 high bid commitment extend to any awarding of the contract, and thus to the 1973 bidding.

6. The manner in which defendant actually tried to lower plaintiffs' bid evidenced its recognition that if plaintiffs were the highest bidder an obligation existed in 1973 to award the contract to them under the terms of the 1972 oral assurances.

7. Kline acknowledged plaintiffs' duration claim when he visited Sitkin in 1973 after the contract had been awarded to Krentzman by advising Sitkin that he felt a "responsibility" to see that Sitkin was given a "fair shake all the way down the line."

With the possible exception of number 1, all the 1973 "evidence' relied upon by plaintiffs, much of which is argument, is neutral at best. It lacked the definiteness that would permit a reasonable inference, as opposed to a guess, that it reflected an intention with respect to the extent of the 1972 high bid assurance. This is particularly true when we recall that the burden rested on plaintiffs. We note in this regard that though plaintiffs argue that the 1972 high bid assurance had been given to Sitkin as the president of one of the plaintiff companies, Sitkin himself never testified that he believed that the 1972 high bid assurance carried over to the 1973 bidding.

As to number 1, the 1973 conversation when Kline informed Bisio of the 1972 assurances, the fact of such a conversation does not tend to prove that the parties had an intent in 1972 that the high bid assurance would continue beyond the particular bid which followed the 1972 assurances. Of more importance, plaintiffs' own bid terminated by its terms on October 20, 1972. To this may be added the evidence that the 1972 bids were limited as to participants and differed substantially as to subject matter from the 1973 bid.

Finally, plaintiffs claim they were entitled to receive the contract in 1973 because under the continued 1972 high bid assurance they were the high bidder. Yet the evidence shows that the elaborate document soliciting the 1973 bids explicitly provided that the defendant reserved the right to reject any or all bids. This provision is flatly inconsistent with the 1972 assurance that if plaintiffs submitted the high bid it would be accepted. Thus, the very documentation which prompted plaintiffs' 1973 bid is inconsistent with an intent that the 1972 high bid assurance would apply until the scrap was sold.

We therefore conclude that whether plaintiff's evidence is viewed singly or cumulatively, it was insufficient as a matter of law to create a jury issue as to whether the 1972 high bid assurance was intended to apply to the 1973 bidding. Plaintiffs therefore were not entitled to recover on their contract claim.

II. The Sherman Act Claim

Plaintiffs urge this court to reinstate the antitrust award on the theory that the defendant conspired with Krentzman to engage in "sham bidding," which they claim constitutes a per se violation of § 1 of the Sherman Act.

Although it is not clear from their briefs, we assume plaintiffs are arguing, alternatively, that the agreement violated § 1 of the Sherman Act under the "rule of reason" standard. The district judge granted defendant's motion for judgment n.o.v. on the antitrust claim, believing that the complained of practices, though "reprehensible and deceitful," did not violate § 1 of the Sherman Act. Defendant urges affirmance of the district court's disposition of this claim.

Section 1 of the Sherman Act declares illegal "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states." 15 U. S. C. § 1 (1970). We must, in the first instance, determine whether the jury was justified in finding that a contract combination or conspiracy existed between defendant and Krentzman, and, if so, whether it was "in restraint of trade." Defendant denies that any conspiracy existed between it and Krentzman. The jury found otherwise.

We believe the jury was entitled under the evidence to conclude that defendant secretly agreed with Krentzman in advance of the 1973 bidding to give Krentzman the opportunity to match the highest bid received in the bidding process and, if Krentzman matched such bid, to award Krentzman the contract. While such an agreement can be said to have made a sham of the bidding, it is clear that we are not talking about sham bidding in the common parlance, where a bidder drives up the sale price without any intention of buying. We understand plaintiffs to be referring to sham bidding in the sense that one bidder was preordained to obtain the contract if that bidder would match the high bid submitted. Having established the fact of an agreement, we proceed to consider whether said agreement was "in restraint of trade."

On its face § 1 of the Sherman Act prohibits *every* contract, combination, or conspiracy in restraint of trade. Since every agreement concerning trade restrains trade in some sense, the courts have construed § 1 as precluding only those contracts or combinations which *unreasonably* restrain competition. *Northern Pacific Ry. v. United States*, 356 U. S. 1, 5 (1958).

As the Supreme Court has recently pointed out in *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U. S. 36 (1977), the prevailing standard of analysis under the Sherman Act is the rule of reason. The rule of reason requires the fact-finder to weigh all circumstances of the case in deciding whether a practice should be condemned because it unreasonably restrains trade. Certain relationships, however, are considered to be in violation of the Sherman Act without regard to any consideration of their reasonableness.

The per se category of antitrust violations is made up of "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Ry. v. United States*, 356 U. S. 1, 5 (1958). Courts must appraise the market impact of practices challenged on the grounds they are violative of the Sherman Act unless there is a per se violation. Since a per se violation is conclusively presumed to be unreasonable, no trial is necessary to show the nature, extent, and degree of the market effect of the practice. *White Motor Co. v. United States*, 372 U. S. 253 (1963).

While plaintiffs contend that the agreement was per se violative of § 1, it is difficult to isolate any specific factors relied upon by them which would allow us to support their contention. They argue that the agreement amounted to price-fixing, a practice widely acknowledged to be a per se violation of the Sherman Act. The price fixing within the scope of the per se prohibition of § 1, however, is an agreement to fix the price to be charged in transactions with third parties, not between the contracting parties themselves. Thus, in *United States v. General Motors Corp.*, 384 U. S. 127 (1966), a case involving horizontal price fixing upon which plaintiffs place some reliance, the purpose of the concerted refusal to deal was to eliminate discounters and thus raise the price of Chevrolets in transactions with consumers, who were third parties, not in transactions between the co-conspirators themselves. In vertical price fixing cases, the prices fixed are resale prices charged to third parties and not the price between the conspiring parties themselves. See *United States v. Parke, Davis & Co.*, 362 U. S. 29 (1960); *Pitchford v. Pepi, Inc.*, 531 F. 2d 92 (3d Cir. 1975), *cert. denied*, 426 U. S. 935 (1976). Thus, the factual foundation for plaintiffs' per se price fixing violation is absent here.

Plaintiffs also assert that the sham bidding conspiracy constituted a concerted refusal to deal, and constituted a per se violation as a group boycott. Accordingly, we have reviewed the significant cases in which the Supreme Court has examined the group boycott and concerted refusal to deal concepts. The controlling cases involve broad combinations and rather pervasive refusals to deal by a group of suppliers covering many transactions over an extended period of time. *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959); *Fashion Originators' Guild of America, Inc. v. F. T. C.*, 312 U. S. 457 (1941); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U. S. 600 (1914). We are not confronted with such a factual situation here.

Plaintiffs have not brought to our attention any case where a court has found a per se violation of the Sherman Act on the basis of a concerted refusal to deal between a single seller and a single buyer. We are reminded of this Court's admonition in *DeFillipo v. Ford Motor Co.*, 516 F. 2d 1313 (3d Cir.), *cert. denied*, 423 U. S. 912 (1975), that " '[t]he term "group boycott" . . . is in reality a very broad label for divergent types of concerted activity. To outlaw certain types of business conduct merely by attaching the "group boycott" and "pe se" labels obviously invites the chance that certain types of reasonable concerted activity will be proscribed.' " *Id.* at 1317-18, *quoting Worthen Bank & Trust Co. v. National Bank Americard, Inc.*, 485 F. 2d 119, 125 (8th Cir. 1973), *cert. denied*, 415 U. S. 918 (1974).

The mere existence of sham bidding, as that term is used by plaintiffs, in our view does not create a presumptive violation of the Sherman Act. We do not find it so anticompetitive that the court routinely should allow a party to invoke the per se rule and thereby avoid the need

to show its affect on commerce in each case. As the Supreme Court has said: "It is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act." *United States v. Topco Associates*, 405 U. S. 596, 607-08 (1971). The so-called sham bidding arrangement here does not fulfill the gloss placed on the statute by the Supreme Court.

Turning to the rule of reason standard, we similarly are unable to conclude that plaintiffs have shown a violation. The standard of reasonableness is "the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided." *Standard Oil Co. of New Jersey v. United States*, 221 U. S. 1, 60 (1911). The basic principle of the rule of reason, well articulated in *Chicago Board of Trade v. United States*, 246 U. S. 231 (1918), is that contractual restraints fall within the prohibition of § 1 only when their purpose and effect is found to have imposed an undue restraint on commerce.

Regarding the purpose for the agreement, it was suggested in the argument on this appeal that the purpose of the "scheme" was to arrive at a purchase price not able to be agreed upon otherwise. This seems to us to be the most logical of the purposes which might be suggested. The parties seemingly desired to find the market price, rather than influence the market price. Likewise, there was no evidence of an intent to affect quantity or quality of any goods or services. With regard to the effect of the combination, no evidence is presented by plaintiffs which suggests that prices, quantity or quality in the scrap metal market were influenced by the combination. Nothing in the record indicates any material diminution in the existing competition for scrap.

All but one of the bidders were destined to come up "empty-handed" with or without the sham bidding. The agreement gave a preference to Krentzman. A manufacturer or trader, however, is free to choose the customers to whom it wishes to sell so long as its conduct has no market control or monopolistic purpose or effect. *Times-Picayune Publishing Co. v. United States,* 345 U. S. 594 (1953); *Reed Brothers, Inc. v. Monsanto Company,* 525 F. 2d 486 (8th Cir. 1975), *cert. denied,* 423 U. S. 1055 (1976).

Defendant's right to exercise this free choice is not limited because of the "sham" and the "sham" does not render the exercise of the choice a violation of the Sherman Act. Conduct not within the scope of the Act is not made into an antitrust violation by accompanying conduct which is reprehensible under some moral or ethical standard or even illegal under some other law.

> [T]he use of conventional antitrust language . . . will not extend the reach of the Sherman Act to wrongs not germane to that act. . . . The antitrust laws were never meant to be a panacea for all wrongs.

Parmelee Transp. Co. v. Keeshin, 292 F. 2d 794, 804 (7th Cir.), *cert. denied,* 368 U. S. 944 (1961).

In applying the rule of reason standard, courts are called upon to judge shades and gradations of competitive impact. The standard for determining what combinations involve the prohibited degree of harm is nowhere spelled out in specific terms. It is clear, however, that plaintiffs have a burden to show more than a de minimus restraint. As Justice Frankfurter pointed out in his concurring opinion in *Associated Press v. United States,* 326 U. S. 1 (1945):

> [E]ver since the Sherman Law was saved from stifling literalness by 'the rule of reason' it is not sufficient to find a restraint. The decisive question is whether it is an unreasonable restraint.

Id. at 27 (Frankfurter, J., concurring) (citations omitted). The Sherman Act "was deigned to prevent restraints of trade which [have] a significant effect on . . . competition." *Apex Hosiery Co. v. Leader,* 310 U. S. 469, 493 n. 15, (1940). Plaintiffs have not met their burden to show how competition was restrained significantly. They have made conclusive statements regarding the harmful effects of the questioned combination, but have provided us with no analysis with which to conclude that defendant has been a party to an unreasonable restraint. In reviewing their claim, we consider the facts rather than "incendiary, yet vague charges" characterizing those facts. *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.,* 339 U. S. 827, 834 (1950).

Plaintiffs have not maintained their burden to show that the combination in any substantial way either did or could affect interstate commerce by controlling market prices, imposing undue limitations on competitive conditions, or unreasonably restricting competitive opportunity. These are the kinds of practices the Sherman Act was enacted to prohibit. *Apex Hosiery Co., supra,* at 493. Applying the rule of reason, we cannot conclude that the practices objected to in the instant case tend to, or actually do, restrain trade so at to violate the Sherman Act.

Plaintiffs' briefs devote much attention to various evils resulting from the scheme promulgated by defendant. We think that application of the Sherman Act to the present facts would be contrary to the rule of reason standard. As one court declared, "the Sherman Act is neither a lowest—responsible—bidder statute nor a panacea for all business affronts which seem to fit nowhere else." *Scran-*

ton Construction Co. v. Litton Industries Leasing Corp., 494 F. 2d 778, 783 (5th Cir. 1974), *cert. denied*, 419 U. S. 1105 (1975). The Sherman Act plays a vital, central role in our economic system. It has been described as the "Magna Carta of free enterprise . . . as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc., supra,* at 610. But just as the Bill of Rights cannot be invoked to protect individual citizens from all forms of personal affront, the Sherman Act cannot proscribe all unseemly business practices. The manipulation of the bids of businessmen, as evidenced in the case at bar, was clearly reprehensible. Nonetheless, the Sherman Act may not be extended beyond its intended scope and used to police the morals of the marketplace.

In view of our determinations, we need not address defendant's request for a new trial.

The judgment of the district court on the contract claim will be reversed.

The judgment of the district court on the Sherman Act claim will be affirmed.

GIBBONS, *Circuit Judge*, dissenting

Because my brothers in the majority have, with respect to the contract claim, usurped the proper function of the jury and, with respect to the antitrust claim, misstated the governing law, I respectfully dissent.

I. THE CONTRACT CLAIM

The theory of plaintiff, Sitkin Smelting and Refining Co., Inc., carefully set out in Judge Van Artsdalen's charge

to the jury, was that Charles Kline acting for FMC Corp. promised in 1972 that, if Sitkin would bid on the FMC plant, FMC (1) would not use Sitkin's bid to negotiate higher bids from other bidders and (2) would, if it accepted any bid, accept the highest bid. The court expressly charged:

> It is only in the event that you find that FMC made the definite promise to Sitkin in respect to the 1972 bidding for the purchase of the entire plant, which promises remained in effect by agreement and assent of the parties in respect to the bidding that took place in 1973. And it could only be on that basis that the plaintiffs could establish any contract between FMC and plaintiffs in regard to the facts of this case.

App. 618. This charge—that in order for Sitkin to recover, the jury must find that the 1972 promises remained in effect in 1973—was repeated several times. Judge Van Artsdalen reviewed the evidence for the jury and pointed out that the testimony on the intention of the parties was conflicting. Given the conflict, he denied FMC's motion for a directed verdict, pursuant to Fed. R. Civ. P. 50(a), and left the issue to the jury on special interrogatories. Before it could return a verdict for Sitkin on the contract claim, it had to—and did—answer the following questions in the affirmative:

> 1. Did FMC Corporation and Sitkin Smelting & Refining Co., Inc., through authorized agents, enter into a contract in 1972 wherein they mutually agreed that if Sitkin Smelting & Refining Co., Inc. made a bid to purchase FMC Corporation's Lewistown plant in its entirety, including real estate, FMC Corporation
>
> (a) would not disclose such bid to any other bidder? Yes

(b) would not use such bid to negotiate higher bids from other bidders? Yes

(c) would, if it accepted any bid, accept the highest and best bid? Yes

2. If any part of No. 1(a), (b) or (c), is answered Yes, did the same terms and conditions as found to exist in the Answer to Interrogatory No. 1 above apply to the bid submitted by Sitkin Smelting & Refining Co., Inc., on behalf of itself and jointly with Monongahela Iron and Metal Co., Inc., in 1973 for the dismantling of FMC Corporation's Lewistown plant, in response to the invitations to bid in accordance with specifications prepared by FMC Corporation? Yes

When, after the verdict, FMC moved for judgment notwithstanding the verdict, pursuant to Fed. R. Civ. P. 50(b), Judge Van Artsdalen denied the motion, saying "[a] careful review of the record . . . convinces me that . . . there was more than sufficient credible evidence upon which the jury could properly base its findings contained in the answers to written interrogatories . . . ." App. 735.

The majority's concedes that there is ample evidence to support the jury's answer to Interrogatory No. 1. Thus we, as a reviewing court, are bound to accept the fact that FMC made the three promises listed in that question. A contract came into being in 1972. Interrogatory No. 2 is concerned, not with its existence, but with its duration and terms. Both depended on the intention of the parties. The majority says that the evidence on duration "lacked the definiteness that would permit a reasonable inference, as opposed to a guess, that it reflected an intention with respect to the extent of the 1972 high bid assurance."

Supra, p. 7. The difficulty with this position is that a contract of *some* duration is acknowledged to have come into existence. It is no less speculative to accept FMC's version than Sitkin's.

The testimony of the two men who negotiated the contract, Lewis Sitkin (for Sitkin) and Charles Kline (for FMC), reveals no express reference to duration. Intention concerning duration must have been determined from the surrounding circumstances. The majority holds as a matter of law that no fact finder could find that the promises listed in Interrogatory No. 1 survived FMC's rejection of the 1972 bids. Plainly that is not so. If, for example, immediately following the rejection of the 1972 bids FMC had taken Sitkin's bid to a third party and used it to fix the price for a negotiated sale of the plant, such disclosure would have been a breach of contract. This result is unaffected by the fact, relied on by the majority, that Sitkin's 1972 bid expired on October 20, 1972. The parties to the contract certainly did not contemplate that on October 21, 1972, FMC could disclose Sitkin's bid to a third party and negotiate a private sale. Having found the 1972 contract, a fact finder could—indeed, must—conclude that some of its covenants extended beyond October, 1972.

Which covenants extended beyond that date? Clearly not the undertaking to accept the highest bid, says the majority, because the 1973 solicitation explicitly reserved the right to reject all bids. The short answer to that argument is: so did the 1972 solicitation. The covenant on which Sitkin relies bound FMC to accept the highest bid *if it accepted any bid.* The majority's observation that "the very documentation which prompted plaintiffs' 1973 bid is inconsistent with an intent that the 1972 high bid assurance would apply until the scrap was sold," *supra,*

p. 8, is tortured reasoning in light of the actual covenant. Had no sale taken place, Sitken would have had no claim. But a bid was accepted, and if, as the jury held, the covenant to accept the highest bid was still binding, then Sitkin did have a claim.

There is evidence that Kline informed Attilio Bisio, who was hired by FMC in March, 1973, and assigned the job of disposing of the plant, about the 1972 agreement with Sitkin. Specifically, Kline told Bisio that he had promised Sitkin, that the latter's bid would not be disclosed and that, if any bid was accepted, it would be the highest bid. Kline told Bisio, in other words, the contract terms which the jury found in Interrogatory No. 1. A reasonable man could conclude that Kline was not engaging in idle conversation but was briefing the man now in charge of disposing of the plant on the contractual limitations within which he had to operate. Had Kline understood in 1973 that the 1972 undertakings were no longer binding, he would have had little or no reason to brief Bisio on them—at least a reasonable man could so conclude.

There is also evidence that after the 1973 bidding Kline acknowledged a special responsibility to Sitkin— "a responsibility to be sure that he had been given an absolutely, completely fair shake all the way down the line," App. 434. This special responsibility toward Sitkin (unlike other bidders) is evidenced by the special treatment accorded Sitkin's 1973 bid and by the personal visit paid to Lewis Sitkin to inform him that his bid had been rejected.

In addition to the evidence of FMC dealings with Sitkin is the evidence of its secret 1973 contracts with Krentzman, the favored bidder. What need for secrecy if FMC had no contractual obligation to Sitkin? A reasonable man could conclude that it evidenced the continuing effect of

the 1972 undertakings. A reasonable jury did so conclude. The majority rejects all this 1973 evidence as not tending to prove the intent of the parties in 1972. By so doing, it substitutes its own evaluation of the evidence for that of the jury. Like the trial judge who heard the testimony and observed the demeanor of Kline, Bisio, and Sitkin, I conclude that the jury was properly asked Interrogatory No. 2 and that its verdict should not be disturbed.

II. The Antitrust Claim

A complaint alleging a conspiracy to deprive a competitor of the benefits of a lawful contract in or affecting interstate commerce by unlawful means states a valid antitrust claim. As summarized by the majority in this case, Sitkin's complaint charged a conspiracy "to commit two per se violations of the antitrust laws: an illegal boycott and price fixing." *Supra*, p. 2. In the first place, this is not a fair characterization of Count II of plaintiffs' complaint. In fact, that count charges:

Count II

> 17. The foregoing constitutes a contract, combination and conspiracy in restraint of trade, in violation of Section 1 of the Sherman Act, 15 U. S. C. § 1.

App. 9. The "foregoing" to which it refers is the factual recitation that FMC and Krentzman secretly and fraudulently conspired with each other to obtain and use Sitkin's bid and to deprive Sitkin of the benefits of the contract which resulted when it submitted the high bid. From the jury's findings, it is clear that there was just such a conspiracy.

It is true that at trial Sitkin analogized what had transpired to group boycott and price fixing, but its plead-

ings did not commit it to any precise category of per se violation. The point it made was that the conspiracy, which everyone agreed affected commerce, had no lawful purpose whatsoever and resulted in the destruction of genuine competition. This was not a case in which reliance on a per se rule was required because no reasonable justification could have been tendered for the immoral conduct found by the jury. None was, in fact, tendered; instead, FMC denied the existence of the conspiracy. The jury, however, found otherwise.

My difference with the majority on the antitrust claim is fundamental. The majority starts with a search for a per se category into which the conspiracy might fit; finding none, it proceeds to examine the substantiality of the effect upon competition. I start, as Judge Taft did in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *modified and aff'd*, 175 U. S. 211 (1899), by searching for a lawful main purpose. If a lawful main purpose for a combination or agreement producing a restraint can be identified, I proceed to inquire whether its effect upon competition is such that it can be called reasonable. But if, as here, no one can identify any lawful purpose for the combination or agreement and if, as here, the resulting restraint affects interstate commerce, then a search for per se categories and an inquiry into the substantiality of effect are not required. A conspiracy that would be unlawful at common law—and I have little doubt about the unlawfulness of this one—must, if it affects interstate commerce sufficiently for federal jurisdictional purposes, violate the Sherman Act.

Moreover, even if there were no such contract as the jury found, there certainly was a solicitation of bids and a conspiracy to deprive bidders not only of the cost of preparing those bids but also of the valuable trade information contained therein. That conspiracy injured every bidder (except Krentzman) in its business or property to the extent of such cost and the value of such information. Being unable to conjure up a lawful purpose for a fake auction and recognizing that this fake auction was conducted in interstate commerce. I would find a Sherman Act violation even without the contract. Without the contract, of course, the amount of damages would be different.

The majority responds that, although manipulation of the bids of businessmen is "clearly reprehensible," the Sherman Act may not be used "to police the morals of the marketplace." *Supra*, p. 14. I had thought, until today, that policing the morals of the interstate marketplace was exactly what Senator Sherman had in mind. A conspiracy to conduct a fake auction in the auction market for securities conducted by our national securities exchanges, for example, was surely within his contemplation.

III. Conclusion

The jury found that there was a breach of contract which was the result of a conspiracy. It found damages in the amount of $700,000. Under Section 4 of the Clayton Act the recovery is three times actual damages. I would affirm the judgment on the contract claim and reverse the judgment on the antitrust claim.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-798

SITKIN SMELTING & REFINING CO., INC., et al.

v.

FMC CORPORATION

Memorandum Opinion and Order

VANARTSDALEN, *J.* October 28, 1976

Plaintiffs sued for breach of contract and sought treble damages for a claimed Sherman § 1 antitrust conspiracy. The jury found liability on both the breach of contract action and the antitrust action and determined plaintiff's damages to be $700,000.00. Damages were tripled for the antitrust claim and judgment was entered for $2,100,000.00. Defendant has moved for judgment n.o.v. on both the contract and antitrust claims, and alternatively for a new trial. The motion for judgment n.o.v. will be granted as to the antitrust claim, and the judgment will be entered in favor of plaintiffs and against defendant in the amount of $700,000 on the breach of contract claim. The motion for a new trial will be denied.

Defendant, FMC Corporation (FMC), owned a large manufacturing facility in Lewistown, Pennsylvania. In the summer of 1972, the facility was extensively damaged by the devastating hurricane "Agnes." Thereafter, FMC decided to close the plant and to sell or otherwise dispose of the tangible physical assets it no longer wished to retain. In addition to the land and buildings, there was a large quantity of salvageable scrap metal, machinery, equipment and inventory having a substantial valve. Initially, FMC sought bids for the purchase of the entire plant, including the real estate.

Joseph Krentzman and Sons (Krentzman) was a local scrap and salvage metal dealer who previously had business dealings with FMC in purchasing and/or disposing of scrap and excess or obsolete equipment of the Lewistown plant. Sitkin Smelting and Refining Co., Inc. (Sitkin), was a local competitor of Krentzman, but had never, previous to the hurricane, been able to negotiate any business transactions with FMC.

Charles Kline, an authorized employee of FMC, had a conversation with Lewis Sitkin, President of Sitkin, after the hurricane in 1972, concerning a possible bid by Sitkin to purchase the entire Lewistown plant. The exact conversation was in dispute and therefore it was for the jury's determination. According to the plaintiff, Mr. Sitkin expressed apprehension that he might just be "spinning his wheels" and wasting a lot of time and effort in proposing a bid, because Sitkin had never previously been given any consideration in its attempts to do business with FMC. Mr. Kline then made definite oral assurances to the effect that the sale of the plant was to be on a strictly competitive bidding basis and if his bid was the highest and the plant was sold, he would get the bid. He was assured that the integrity of the bidding process would be upheld and that his bid would not be utilized as a bargaining weapon

to obtain a higher bid from Krentzman or anyone else. Sitkin, in reliance upon Mr. Kline's assurances, said he would submit a bid, which, after an extensive examination of the premises, he subsequently did. Mr. Kline's testimony did not dispute the general substance of the conversation. However, the defendant does dispute the legal significance of that conversation. Defendant denies that the conversation plus the fact that Sitkin later submitted a bid, constituted, at any time, a binding contract. Subsequently, several bids to purchase the entire plant were received by FMC including one from Sitkin and another from Krentzman. After these bids were received, FMC altered its plans whereby it would donate the real estate, including land and buildings to the Miflin County Industrial Development Authority, and sell only the scrap, machinery, and other equipment that FMC did not want. The purchaser would be required to dismantle and remove the personalty purchased according to intricate and detailed specifications and timing. Because of this change in plans, FMC decided to invite dealers to bid for the dismantling and disposal of the property.

In July, 1973, FMC prepared detailed bid documents that contained various options including possible participation by FMC in the proceeds of the sale of the property. Invitations to bid were sent to approximately 50 prospective bidders throughout the United States. The invitations contained the usual right to reject any and all bids. They also stated: "No revision of bids will be accepted after the bid has been submitted; your best bid must be submitted first." Sitkin submitted a bid jointly with the co-plaintiff, Monongahela Iron and Metal Co., Inc., a demolition expert. Krentzman also submitted a bid, as did many of the other invitees. Because of the complicated nature of the bids with various options and alternate bids, FMC hired an independent expert, Irving Altman, to analyze the bids and make recommendations to FMC. Thereafter a series of clarification meetings were separately held with certain of the apparently more favorable bidders, including Sitkin and Krentzman. Subsequent to one of these clarification meetings between FMC and Krentzman, Krentzman submitted a higher bid which FMC eventually accepted. Sitkin contended at trial not only that its bid was the highest and best before the clarification meetings, but that it remained so even after Krentzman submitted its revised second bid.

Sitkin contends that when it agreed to submit a bid for the entire plant in 1972, on the strength of Mr. Kline's assurances, a binding contract was thereupon formed and remained applicable through and including the 1973 bidding for the dismantling and salvaging of the plant equipment. Sitkin further contends that FMC breached this contract in several respects when it awarded the salvage contract to Krentzman who was not the highest and best bidder. As to damages, Sitkin contends that "but for" the breach in awarding the contract to Krentzman, the bid would have gone to Sitkin who would have made a substantial profit. In answer to special interrogatories, the jury found that there was such a contract and that it was breached by FMC.

A careful review of the record and the extensive post-trial briefs submitted by both parties convinces me that (1) there was more than sufficient credible evidence upon which the jury could properly base its findings contained in the answers to written interrogatories, (2) the evidence submitted was admissible and (3) the issues were submitted to the jury on adequate instructions as to the law applicable to the breach of contract claim. Therefore, the judgment for the plaintiff in the sum of $700,000 on the breach of contract claim will remain in force.

The antitrust claim charges that FMC and Krentzman conspired with each other whereby they agreed that Krentzman would be awarded the contract at a price established at or very close to the highest and best bid submitted, and that no competitor of Krentzman would be awarded the contract. Plaintiff contended that such conspiracy effectively foreclosed and "boycotted" all competition from the market for this valuable contact. In addition, plaintiff argued that such an agreement constituted a form of "price-fixing." There was sufficient credible evidence, primarily circumstantial, from which a jury could find that Krentzman and FMC did in fact agree that Krentzman would receive the contract if it approximately equaled any submitted bid. There was also sufficient evidence that the Sitkin bid was the highest and best bid, both as originally submitted by all parties, and even in comparison with the contract actually awarded to Krentzman. In addition, the evidence was sufficient for a finding that the contract was not awarded on the basis of competitive bidding, that Sitkin's bid was disclosed to Krentzman prior to Krentzman submitting its final revised bid, and that Sitkin's bid was used as a leverage device to obtain a better price from Krentzman. Whether, assuming these facts, FMC was guilty of any antitrust violation is the issue to be decided.

A private corporation invites selected contractors to submit written bids based on detailed specifications for dismantling and disposing of salvageable material from a shut-down plant. Secretly, it agrees with one of the invited bidders, that such bidder will be awarded the contract, if any contract is to be awarded, at a price established by the highest and best bid. That secret agreement is subsequently carried out and the salvage contract awarded accordingly, despite the fact that another bidder was assured that the bids would be kept secret, that the bids

would not be utilized to negotiate higher bids from others, and that if any contract was awarded, it would be to the highest and best bidder. Does the bidder who was, in fact, the highest and best bidder have an action for damages against the corporation that awarded the bid, for violation of § 1 of the Sherman Act?

Plaintiff contends that FMC was guilty of two different per se antitrust violations; namely, a boycott or concerted refusal to deal, and price fixing. Although the conduct described in the preceding paragraph, as found by the jury's answers to interrogatories, can best be described as reprehensible, deceitful and fraudulent as to other bidders, I find no cause that would make such action a violation of § 1 of the Sherman Act.

Plaintiff relies strongly on *Premier Electrical Construction Company v. Miller-Davis Co.*, 422 F. 2d 1132 (7th Cir.), *cert. denied*, 400 U. S. 828 (1970). In that case an electrical subcontractor alleged that prior to defendant, a general contractor, submitting a bid on a substantial government construction project, the plaintiff and defendant agreed that plaintiff would quote a subcontract price to defendant substantially less than quotations it would make to any other prospective general contract bidders, provided defendant would award plaintiff the subcontract if defendant obtained the general contract. Defendant was awarded the contract but gave the electrical subcontract to another subcontractor who underbid plaintiff. The district court dismissed the action on the pleadings holding that a prior breach of contract action between the parties decided adversely to plaintiff was *res judicata* and that plaintiff was barred under the doctrine of *in pari delicto*. The circuit court reversed. In so doing, the court stated:

> On the basis of these pleadings the agreement between Miller-Davis and Premier constitutes a per se

> violation of the Sherman Act. By preventing Premier from submitting bids to other general contractors at the same prices made available to Miller-Davis, the agreement constitutes a concerted refusal to deal. [citations omitted] The general contractors were thereby denied meaningful access to the market for the Argonne project contract . . . [citations omitted] We also believe the agreement violates the prohibition against price restraints . . . [citations omitted] The intended effect and probable result of the agreement here was to cause a higher overall price on the Argonne project contract than would otherwise have prevailed.

422 F. 2d 1132 at 1137.

The contention in the present case is that FMC and Krentzman agreed to preclude all other bidders from competing with Krentzman for the contract, thereby fixing the contract price on a non-free market. The difficulty that I find with this argument is that there is nothing to prevent a corporation from agreeing to award a contract to a particular contractor irrespective of whether others may bid more or less. Although it may be normally reprehensible and deceitful to conduct sham competitive bidding in order to establish the contract price with a contract previously agreed upon, I do not understand this to be a restraint of trade within the meaning of § 1 of the Sherman Act. I fail to see how FMC's refusal to deal with other contractors, including Sitkin, is a "concerted" refusal to deal, simply because FMC agrees that Krentzman will, in effect, have the option of obtaining the contract if it will do the work at the price established by the best bid among the competitors.

Certainly there would have been nothing illegal if FMC had announced, prior to soliciting competing bids,

that Krentzman would be the preferred bidder and would be awarded the contract, if, after the bids were opened, Krentzman then offered to "meet or beat" the highest bid. The fact that such option was secretly negotiated might be sufficient evidence of a conspiracy but such would not, in any meaningful way that I can discern, constitute any restraint on trade or the operation of a free market place. I see nothing about this transaction, insofar as having any restraining effect on trade, that would be different from a secret or undisclosed exclusive dealing contract or a requirements contract whereby a manufacturer sells to but a single customer.

The antitrust claim was submitted to the jury and in answering interrogatories the jury made special findings that there was a conspiracy to refuse to deal with other bidders and to fix the contract price. A reviewing court will have the advantage of such findings so that if my interpretation of the scope of the coverage of § 1 of the Sherman Act is too restrictive, the treble damage award may be reinstated.

Defendant has raised numerous questions concerning the admission of evidence. A review of the record and post-trial briefs leads me to conclude that such evidence as was received over defense objections was proper, had probative value, and if admissible for a limited purpose was so received with proper cautionary instructions to the jury at the time or in the general charge. The newly adopted rule of evidence were certainly not intended to preclude a jury from hearing that which to a reasonable, logical mind would have some probative value in determining a fact in issue.

Defendant objected to the introduction into evidence of the memorandum prepared by Mr. Altman, the expert employed by FMC to analyze the bids. Although Mr. Altman was an independent expert, for the purposes of

analyzing the bids, he was an agent of FMC. The memorandum expressed certain conclusions as to the various bids and was highly relevant as to which bid was the highest and best bid. In any event, the memorandum could be received in evidence to establish information which FMC had available at the time it awarded the contract to Krentzman and to rebut FMC's testimony tending to establish that Sitkin's bid was ambiguous and could not be interpreted.

On the issue of damages, defendant wanted to show that for the years 1971 through 1974 inclusive, Sitkin made relatively low profits on its gross business. This would have had no probative value in determining what profit Sitkin would have realized on the FMC contract if it had been awarded, what all parties concede, should have been a favorable and profitable contract. Based on participating proceeds paid to FMC by Krentzman and the terms of the bid of Sitkin, there was substantial evidence to establish the amount of the loss of anticipated profits. Whether Sitkin made a profit or suffered a loss on its general business during the years in question was not relevant.

Defendant moved for a mistrial when plaintiff's counsel referred, during cross examination, to a prior civil action against Krentzman, in violation of a trial ruling. The ruling was made out of an abundance of caution, and it is doubtful that defendant could validly have objected in the absence of the ruling. In any event, an immediate and clear cautionary instruction was given to the jury. Jurors who are all called upon to determine many complicated factual issues, should be able to follow a direct instruction. In any event, I fail to see how a juror would, in this litigious day and age, be prejudiced against a businessman or a corporation because another business entity had previously filed a lawsuit against such person or entity.

Krentzman, in making the original bid, was one of a group of partners who subsequently had a disagreement with the partners. The deposition of one of the partners, Bert Green, was taken and portions were received in evidence which tended to show that prior to the time Krentzman submitted the bid, one or more of the partners was aware of the Sitkin bid. Defendant argues that this is no proof that such a bid was disclosed by FMC. However, this would appear to be a bit circumstantial evidence that could properly be considered. Further, it tended to contradict evidence by FMC that FMC had revealed the bid to no one, especially if the jury accepted Sitkin's testimony to the effect that he never disclosed the bid to any third party.

The defendant argues that the jury was not clearly instructed that even if it should find a breach of contract, the antitrust claim was independent and separate. I believe the instructions made this abundantly clear to the jury, as did the interrogatories. In any event, if my present ruling to dismiss the antitrust claim by entering a judgment n.o.v. is correct, then defendant's argument becomes irrelevant even if otherwise correct. Finally, defendant now contends that the answers to the interrogatories are inconsistent with each other. However, defendant does not contend that it objected, at the time, to these interrogatories being submitted. Although the jury found Sitkin's bid to be the highest and best bid, defendant consistently contended it was not. If so, then it is entirely consistent for the jury to find that the Sitkin bid was utilized by FMC to obtain an increased bid from Krentzman to whom it then awarded the bid even though not, in fact, the highest and best bid then outstanding Plaintiff's entire theory of the conspiracy is based on the premise that Krentzman was assured of being awarded the contract provided his bid was approximately equal to the best bid, regardless of whether

in final analysis it was a little higher or a little lower, but that the standard whereby the ultimate price would be established would be the high bid.

This case presented unusual facts. It was, however, well presented to the jury by very competent and skillful attorneys who were able to focus the jury's attention on the essential facts and issues without undue extraneous material. I am convinced that the jury made an impartial and careful determination and that a new trial is not warranted.

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-798

SITKIN SMELTING & REFINING CO., INC., et al.

v.

FMC CORPORATION

Interrogatories to the Jury

We, the jury, find in FAVOR of the *plaintiffs* (plaintiffs or defendant) on the issue of liability as to the plaintiffs' claim for damages for breach of contract by defendant, and answer the following interrogatories:

1. Did FMC Corporation and Sitkin Smelting & Refining Co., Inc., through authorized agents, enter into a contract in 1972 wherein they mutually agreed that if Sitkin Smelting & Refining Co., Inc., made a bid to purchase FMC Corporation's Lewistown plant in its entirety, including real estate, FMC Corporation

(a) would not disclose such bid to any other bidder? YES X NO ___

(b) would not use such bid to negotiate higher bids from other bidders? YES X NO ___

(c) would, if it accepted any bid, accept the highest and best bid? YES X NO ___

2. If any part of No. 1 [(a) (b) or (c)], is answered YES, did the same terms and conditions as found to exist in the Answer to Interrogatory No. 1 above apply to the bid submitted by Sitkin Smelting & Refining Co., Inc., on behalf of itself and jointly with Monongahela Iron and Metal Co., Inc., in 1973 for the dismantling of FMC Corporation's Lewistown plant, in response to the invitations to bid in accordance with specifications prepared by FMC Corporation? YES X NO ___

3. If No. 2 is answered YES, did FMC Corporation breach such contract with Sitkin Smelting & Refining Co., Inc. in respect to the 1973 bid for the dismantling of FMC Corporation's Lewistown plant? YES X NO ___

4. If No. 3 is answered YES, did FMC Corporation, in breach of such contract with Sitkin Smelting & Refining Co., Inc.,

(a) disclose the joint bid of Sitkin Smelting & Refining Co., Inc., and Monongahela Iron and Metal Co., Inc. to another bidder or bidders? YES X NO ___

(b) utilize such joint bid to negotiate a higher bid or bids from another bidder or other bidders? YES X NO ___

(c) award the bid to a bidder other than the highest and best bid submitted in compliance with the specifications? YES X NO ___

5. If any part of No. 4 is answered YES [(a), (b) or (c)], did the joint bid submitted by Sitkin Smelting & Refining Co., Inc., in 1973 for the dismantling of FMC Corporation's Lewistown plant comply with the specifications prepared by FMC Corporation? YES X NO ___

(a) Was it the highest and best bid submitted by any bidder prior to any "clarification conference" or "renegotiation" meeting with any bidder? YES X NO ___

(b) Was it the highest and best bid submitted by any bidder at any time? YES X NO ___

We, the jury, further find in FAVOR of the *plaintiffs* (plaintiffs or defendant) on the Anti-Trust claim for violating Section 1 of the Sherman Anti-Trust Act, and answer the following interrogatories:

6. Did FMC Corporation enter into any unlawful contract, combination or conspiracy with Joseph Krentzman and Sons whereby Sitkin Smelting & Refining Co., Inc., and any and all other bidders except Joseph Krentzman and Sons

would be excluded from being awarded the contract to dismantle FMC Corporation's Lewistown plant irrespective of any bids that might be submitted? YES X NO___

7. Did FMC Corporation enter into any unlawful contract, combination or conspiracy with Joseph Krentzman and Sons whereby Joseph Krentzman and Sons would be awarded the contract to dismantle FMC Corporation's Lewistown plant at a price that would be set and fixed by the highest and best bid of all the bidders, if any contract was awarded? YES X NO___

ANSWER THE FOLLOWING INTERROGATORY NO. 8 *only if* you have found in FAVOR of plaintiffs on the issue of liability as to either or both the breach of contract claim and/or the anti-trust claim.

8. In what amount do you find plaintiffs to have been damaged? $700,000.00

Supreme Court, U. S.
FILED
AUG 31 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-208.

SITKIN SMELTING & REFINING CO., INC.,
MONONGAHELA IRON & METAL CO., INC.,
Petitioners,

v.

FMC CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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QUESTIONS PRESENTED.

1. Should not this Court deny certiorari in a case where the Court of Appeals' decision was not in conflict with any prior decision of this Court or of any lower court and petitioners' novel theory—"sham bidding" as a per se violation of Section 1 of The Sherman Act—was not tried or raised in the district court and no anti-competitive purpose or effects have been demonstrated?

2. Should not this Court deny certiorari in a case where the Court of Appeals, applying the proper standard of review, concluded that there was insufficient evidence for the jury to reasonably infer that the 1972 oral assurances applied to the 1973 bidding procedure, a necessary element in petitioners' contract claim?

COUNTERSTATEMENT OF THE CASE.

During the summer of 1972, Hurricane Agnes flooded FMC's rayon manufacturing facility. The damage was so extensive, FMC decided to close the plant.

On September 8, *1972* Louis Sitkin wrote to FMC expressing interest in bidding on the purchase of FMC's entire rayon plant facility, particularly the real estate. The letter stated:

> Our phone conversation of this afternoon subject real estate, we wish to advise you of our interests. . . . We are interested in building, possibly equipment, machinery, etc., as well as real estate.

After Sitkin's inquiry in the fall of 1972, Kline gave the assurances that are the subject matter of this action. He told Sitkin that if his bid were highest and best and if FMC sold the plant, it would sell it to him.

In response to those assurances, Sitkin submitted a bid that expired by its own terms on October 20, 1972. Neither Sitkin nor Kline, the only two persons who were present when the assurances were given, testified that he understood or intended the assurances to apply to anything other than the 1972 bidding for the land and the plant and its contents.

FMC withdrew its offer to sell the entire facility and did not accept either of the two bids it received. Sitkin testified that he felt FMC had dealt with him honorably: FMC had not violated Kline's assurances.

It was not until 1973 that the bidding about which petitioners are complaining occurred.

At that time, FMC donated the rayon plant and real estate to Mifflin County Industrial Authority and decided to take bids on the contents of the plant.

A three-person FMC team with the help of an outside consultant composed an invitation to bid which consisted of a two-page letter with a 122-page detailed book of specifications attached and incorporated into it, specifically outlining the bidding procedure to be followed. The invitation to bid letter specifically reserved to FMC the right to reject any and all bids. Petitioners agree that they have no cause of action respecting this 1973 invitation to bid: ". . . the highest and best bidder has no contractual right to recover at all, because a bid submitted in response to a bid solicitation does not create a contract." (Petition, p. 10).

On September 12, *1973*, the invitation to bid was sent to 50 bidders, including Sitkin Smelting & Refining Co., Inc. ("Sitkin") and Monongahela Iron & Metal Company, Inc. ("Monongahela"), the other petitioner in this action.

Petitioners' claim is that FMC's behavior in failing to accept its joint bid for the contents of the plant violates the 1972 assurances Kline gave to Sitkin and constitutes a violation of Section 1 of The Sherman Act.

The Court of Appeals set aside the jury's finding that the "1972 high bid assurance was intended to apply to the 1973 bidding," [1] because there was no evidence from which one could draw a reasonable inference that the 1972 high bid assurance was intended to apply to the 1973 bid procedure. The Court of Appeals also affirmed the District Court's findings that FMC's conduct did not constitute a violation of the Sherman Act. The appellate court found plaintiffs neither proved nor even attempted to prove an anticompetitive purpose or effect in this case. Nor did

1. The Court of Appeals did not find the 1973 bidding to be a "second round" of bidding as Petitioners state in their Statement of the Case (Petition, p. 4). In fact, their decision and the evidence in the record is to the contrary.

the Court of Appeals find any precedent or basis for creating the new per se violation of The Sherman Act that plaintiffs proposed. Plaintiffs' petition for rehearing in banc was submitted to the nine active judges on the Court of Appeals. Only one (the dissenting judge in the original decision) voted for rehearing.

REASONS FOR DENYING THE WRIT.

The petition does not merit review by this Court because the Court of Appeals' decision does not conflict with this Court's prior decisions, and none of petitioners' contentions are of great importance.

I. The Sherman Act Claim.

After a careful review of petitioners' contentions in light of the evidence and the jury's findings, the Court of Appeals concluded that neither the purpose nor the effect of respondent's conduct was anticompetitive. On the issue of purpose, the Court found "no evidence of an intent to affect quantity or quality of any goods or services" (A13).[2] On effect, the Court likewise found "no evidence . . . presented by plaintiffs which suggests that prices, quantity or quality in the scrap metal market were influenced by the combination. Nothing in the record indicates any material diminution in the existing competition for scrap" (A13).

Petitioners do not challenge the appellate court's finding that they neither proved, nor attempted to prove, any anticompetitive purpose or effect in this case. Instead petitioners maintain that they were relieved of this burden because respondent's conduct was "illegal on its face." (Petition, 5-6.)

The Court of Appeals addressed this same argument and found it "difficult to isolate any specific factors relied on by [petitioners] which would allow us to support their contention" (A11). The Court began by summarily rejecting the only per se theories which petitioners had argued in the District Court (price fixing and group boy-

2. Unless otherwise stated, references are to the Petition Appendix, in which the page numbers are preceded by the capital letter "A".

cott) (A11-12), a ruling which petitioners do not challenge here. The Court then turned to the per se theory ("sham bidding") which petitioners had not raised in the District Court, but are now pressing in this Court. Here again the Court of Appeals concluded that the conduct under attack was not "so anticompetitive that the court routinely should allow a party to invoke the per se rule and thereby avoid the need to show its affect [sic] on commerce in each case" (A12-13).

Petitioners' challenge to this holding consists, as it did in the Court of Appeals, of "conclusory statements regarding the harmful effects of the questioned combination . . . with no analysis with which to conclude that [respondent] has been a party to an unreasonable restraint" (A15). Thus, petitioners airily suggest that an alleged agreement to award a contract to one particular bidder if he matches the highest bid received from other bidders has three effects which are so pernicious as to warrant the creation of a new per se offense. According to petitioners these effects are: the other bidders do not realize that they should use "other means" besides bidding to obtain the contract; the contract price and identity of the purchase would be different absent such an agreement; and "potential competition" for the contract by unsuccessful bidders is allegedly "destroyed." (Petition, 6-7.)

Petitioners' semantic exercise is without merit. As this Court pointed out in *National Society of Professional Engineers v. United States,* No. 76-1767, 46 U. S. L. W. 4356, 4360 (April 25, 1978), "[t]he Sherman Act does not require competitive bidding. . . ." Thus, respondent could have awarded the contract to Krentzman without soliciting any other bids or even notifying anyone of its intention to sell the facility. Yet this admittedly lawful course of action would have produced every one of the

"anticompetitive" effects cited by petitioners to an even greater degree than the conduct alleged in this case. Had respondent decided to sell the Lewistown facility to Krentzman without prior notice to anyone else, respondent would have violated no law even though the other scrap dealers would have had no opportunity to submit any offers or use any "other means" to obtain the contract. The result should be no different in this case where other dealers have in fact been given notice and an opportunity to bid. Second, had respondent decided to sell the Lewistown facility to Krentzman without soliciting any other bids, it would have been immaterial whether the contract price approximated some ideal market price or not. The result should be no different in this case where respondent used a bidding procedure the purpose of which was, as characterized by the Court of Appeals, "seemingly . . . to find the market price" (A13). Finally, had respondent decided to notify no one else of the sale and negotiate only with Krentzman, respondent would have violated no law even though the "potential competition" of others would have had no effect at all on the negotiations. The result should be no different in this case where the bidding procedure turned the "potential competition" of others into actual competition that, according to the Court of Appeals, assisted the parties "to find the market price" (A13).

In short, the "harmful" effects relied on by petitioners are trivial. Indeed, they are an inevitable feature of many ordinary commercial contracts and are certainly not so "manifestly anticompetitive" as to warrant creation of a new per se offense. See *Continental T. V., Inc. v. GTE Sylvania Inc.,* 433 U. S. 36, 49-50 (1977).

Petitioners assert that the Court of Appeals' decision conflicts with this Court's decision in *National Society of Professional Engineers v. United States, supra.* The only

similarity between the two cases is that both happened to involve bidding. *National Society of Professional Engineers* involved a horizontal agreement among 69,000 Society members not to engage in the "unethical" practice of competitive bidding. While perhaps "not price fixing as such," the agreement had an admitted purpose to "maintain the price level," *id.* 4359, and contained many elements of a group boycott. See *Fashion Originator's Guild of America, Inc. v. FTC*, 312 U. S. 457 (1941). It thus bore the hallmarks of a classic per se offense. The case at bar is wholly different. The agreement alleged, but not conceded in this case was a vertical agreement[3] between a single buyer and a single seller (A12) which, even accepting petitioners' characterization, involved the kind of de minimis restraint (A14) that attends many ordinary commercial contracts. See pp. 6-7, *supra*. *Professional Engineers* simply has nothing to do with this case.

Petitioners argue alternatively that the burden was on respondent to prove a "lawful purpose" in this case. This assertion is unsupportable. The burden is on the plaintiff to prove an unreasonable restraint of trade, not on the defendant to prove the absence of one.[4] The Court of

3. Petitioners assert that the distinction between horizontal and vertical agreements is immaterial. (Petition 7-8.) This Court has rejected that view. See *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U. S. 36 (1977); *White Motor Co. v. United States*, 372 U. S. 253 (1963).

4. See *United States v. Arnold, Schwinn & Co.*, 388 U. S. 365, 374 n. 5 (1967), *overruled in part on other grounds, Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U. S. 36 (1977). Petitioners rely exclusively on certain language buried in the Court of Appeals' decision in *Addyston Pipe & Steel Co. v. United States*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U. S. 211 (1899) in support of their contention that defendants have the burden of proving a lawful restraint. The passage they cite, however, was merely a background discussion of the wholly unrelated common law doctrine of ancillary restraints, which this Court's opinion subsequently ignored. *Addyston Pipe* provides no authority for petitioners' contention.

Appeals held that regardless of FMC's purpose,[5] plaintiffs had failed to carry that burden of proof (A13-15), and that decision is not inconsistent with any decision of this Court.

Petitioners also assert that the issues raised in this Petition are of "great importance," (Petition 10). In fact, they are not. Petitioners concede that they had a remedy under state law to recover the actual losses they had suffered (A5, n. 1; Petition 10). But they renounced that remedy and now appeal to this Court to grant them a huge windfall on some general deterrence theory. But, as the Court of Appeals pointed out, quoting a very similar case in which this Court denied certiorari, "the Sherman Act is neither a lowest-responsible-bidder statute nor a panacea for all business affronts which seem to fit nowhere else" (A15), quoting *Scranton Construction v. Litton Industries Leasing Corp.*, 494 F. 2d 778, 783 (5th Cir. 1974), *cert. denied*, 419 U. S. 1105 (1975).

II. The Contract Claim.

Respecting the contract claim, the Court of Appeals simply found after "set[ting] forth the facts in a light most favorable to plaintiffs," one could not draw "a reasonable inference, as opposed to a guess," that the evidence reflected an intention that the 1972 high bid assurance apply to the 1973 bidding procedure (A8). Accordingly, the Court of Appeals held that "whether plaintiffs' evidence is viewed singly or cumulatively, it was insufficient as a matter of law to create a jury issue as to whether the 1972 high bid assurance was intended to apply to the 1973 bidding" (A9).

5. The Court of Appeals did believe, however, contrary to petitioners' assertion that respondent had no valid purpose, that the "parties seemingly desired to find the market price," a goal that is hardly inconsistent with the antitrust laws.

Petitioners claim the Court of Appeals applied the wrong standard of review in determining the sufficiency of the evidence here. The standard of review is not at issue: the Court of Appeals applied the standard of review that has been dictated by this Court and has been applied in other circuits. What petitioners are actually attacking is the Court of Appeals' application of that standard to the evidence here, an attack which is without basis and which does not raise a question that merits the attention of this Court.

The standard that the Court of Appeals applied here in finding the evidence insufficient to raise a jury issue of whether the 1972 assurances applied to the 1973 bidding is the proper one. The court viewing the facts "in a light most favorable to plaintiffs," found there was no jury issue because there was no evidence which "would permit a reasonable inference, as opposed to a guess," that the 1972 assurances were intended to apply to the 1973 bidding procedure, a critical element in petitioners' contract claim. This is precisely the standard set forth by this Court:

> "When evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. (Citations omitted.)"
>
> *Brady v. Southern Ry. Co.*,
> 320 U. S. 476, 479-80 (1943).

Petitioners' contention that the jury should determine, presumably by "guessing," the intention of the parties[6] on the basis of evidence from which no reasonable inference can be drawn combined with counsel's argument has no basis in law or logic, and it is not supported by the cases petitioners cite.

This Court's statements in *Lavender v. Kurn*, 327 U. S. 645, 653 (1946), do not, as petitioners claim, support such a standard of review. This Court in *Lavender* said that it is the function of the fact-finder to find *the most reasonable inference*. *Lavender v. Kurn*, 327 U. S. at 653, It did not hold or imply that a jury finding based on an unreasonable inference should be sustained. To the contrary, this Court in *Lavender* held that the jury verdict should be sustained there because, unlike here, there was *a reasonable basis* for the jury's inferences. *Lavender v. Kurn*, 327 U. S. at 652.

Nor did this Court depart from the principles respecting credibility and weighing the evidence enunciated in the cases cited by petitioners. The Court of Appeals neither asserted nor applied a standard under which it should determine or weigh credibility. Rather, the deficiency the Court of Appeals found respecting the evi-

6. Though petitioners refer to the proposition that "where no duration is specified in a contract, the intention of the contracting parties as to duration must be determined by the jury from the surrounding circumstances and by application of a reasonable construction to the agreement as a whole," that proposition is not at issue here. The Court of Appeals did not take issue with that proposition. To the contrary, its findings are based on that proposition. The Court of Appeals found the evidence insufficient because of the absence of evidence to support petitioners' contention that the intention of the contracting parties was that the assurances endure through the 1973 bidding:

> "Such evidence [the evidence relied upon by petitioners] is neutral at best as to the parties' intent with respect to the duration of the oral assurance to award the contract to the original high bidder" (A7).

dence was that there was no evidence from which one could *reasonably* infer that the 1972 assurances applied to 1973.

Moreover, petitioners' proposed standard makes no sense because it completely eliminates the role of the court in determining the sufficiency of the evidence where there is a jury. Since the jury under petitioners' proposed standard is free to make findings where there is no evidence to support those findings, there would be no basis for a non-suit or directed verdict in any case.

What petitioners are actually attacking is the Court of Appeals' analysis of the sufficiency of the evidence. However, it has long been recognized that certiorari should not be granted to review questions of the sufficiency of the evidence. *E.g., Houston Oil Company of Texas, et al. v. Goodrich, et al.*, 245 U. S. 440 (1918); *Southern Power Co. v. North Carolina Public Service Co., et al.*, 263 U. S. 508 (1924); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 178 (1938).[7]

Moreover, the analysis of the evidence by the Court of Appeals was proper here. The Court of Appeals set forth and carefully analyzed each piece of "evidence" relied upon by petitioners.[8] It properly found much of

7. Though this Court did grant certiorari to consider the sufficiency of the evidence in the one Supreme Court case cited by petitioners, *Lavender v. Kurn*, 327 U. S. 645 (1946), in *Lavender* this Court was affected by the fact that *Lavender* was a *Federal Employers' Liability Act* case. Cf. *Brady v. Southern Ry. Co.*, 320 U. S. 476, 479 (1943); *Wilkerson v. McCarthy*, 336 U. S. 53, 55 (1949); *Harris v. Pennsylvania R. Co.*, 361 U. S. 15 (1959).

Even where certiorari is granted on other issues, questions in the petition respecting the sufficiency of the evidence are often excluded. *E.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 484, n. 8 (1977).

8. Though petitioners state that respecting the application of the 1972 assurances to the 1973 bidding, the District Court judge found "eight items of evidence" to be "more than sufficient[ly]

the so-called "evidence" petitioners relied upon to be not evidence, but argument (A8),[9] and the rest to be neutral, that is not tending to prove anything singly or cumu-

8. (Cont'd.)
credible," this is a mischaracterization of the District Court's opinion.

The District Court, unlike the Court of Appeals, did not point to any items of evidence or discuss whether there was sufficient evidence to support the jury finding that the 1972 assurances applied to the 1973 bidding.

The District Court merely stated plaintiffs' contention respecting the application of the 1972 assurances to the 1973 bidding:

> "Sitkin *contends* that when it agreed to submit a bid for the entire plant in 1972, on the strength of Mr. Kline's assurances, a binding contract was thereupon formed and remained applicable through and including the 1973 bidding for the dismantling and salvaging of the plant equipment." (*Emphasis added*) (A27)

Thus, the conclusory statement respecting the "more than sufficient credible evidence" quoted by petitioners is not a conclusion reached after a discussion of the evidence. Nor is is even a conclusion directed to the jury finding that the 1972 oral assurances applied to the 1973 bidding. Rather it is the District Court's unsupported general reaction to the jury answers to all the interrogatories.

In fact, the District Court did not set forth or analyze "eight pieces" of evidence respecting any issue. Rather, the District Court merely set forth a narrative of what happened [A24-A26], with contradictory comments respecting the evidence. For example, respecting what was said during the conversation between Sitkin and Kline in which the assurances were given, the District Court judge stated both that: "The exact conversation was in dispute and therefore it was for the jury's determination;" [A25], and that "Mr. Kline's [company witness respecting the assurances] testimony did not dispute the general substance of the conversation. However, the defendant does dispute the legal significance of that conversation;" [A26].

9. Petitioners mislead this Court by quoting the Court of Appeals as characterizing the evidence as "argumentative" and thus of little weight (Petition, p. 11).

Nowhere does the Court of Appeals use the word "argumentative." Rather, the Court of Appeals points out that much of what plaintiff relies upon as "evidence" is in fact "argument" and thus not evidence at all and of course is entitled to no weight:

> ". . . the 1973 'evidence' relied upon by plaintiffs, much of which is argument, is neutral at best." (A8)

latively. Among the facts upon which the Court of Appeals' analysis was based are:

(1) Petitioners had the burden of proving the 1972 assurances applied to the 1973 bidding;

(2) Petitioners failed to produce evidence tending to prove the 1972 assurances applied to 1973;

(3) Not even petitioners testified that they believed the 1972 assurances were intended to carry over to 1973;

(4) Petitioners' part of the bargain, their bid which was submitted in response to the 1972 assurances, on its face expired on October 20, 1972; and

(5) The statements in the 1973 written bid solicitation materials, particularly FMC's reserving the right to reject any and all bids, were "flatly inconsistent" with the 1972 oral assurances.

Thus, the Court of Appeals was correct in finding that the evidence was insufficient as a matter of law to raise an issue of fact as to whether the 1972 high bid assurance applied to the 1973 bidding.

CONCLUSION.

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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